



Title 76 Recodification

Chapter 5, Parts 2 and 4; “Victim”

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Criminal Code Evaluation Task Force

September 21, 2021



Title 76 Recodification

Chapter 5, Part 2

76-5-205.5. Special mitigation for mental illness or provocation reducing the level of criminal homicide offense – Burden of proof – Application to reduce offense.

(1) As used in this section:

- (a) (i) "Extreme emotional distress" means an overwhelming reaction of anger, shock, or grief that:
 - (A) causes the defendant to be incapable of reflection and restraint; and
 - (B) would cause an objectively reasonable person to be incapable of reflection and restraint.
- (ii) "Extreme emotional distress" does not include:
 - (A) a condition resulting from mental illness; or
 - (B) distress that is substantially caused by the defendant's own conduct.
- (b) "Mental illness" means the same as that term is defined in Section 76-5-205.

(2) Special mitigation exists when a defendant causes the death of another or attempts to cause the death of another:

- (a) (i) under circumstances that are not legally justified;
- (ii) the nature of the delusion is such that, if the defendant believed them to be in the delusional state, those beliefs would constitute a justification for the defendant's conduct; and
- (iii) the defendant's actions, in light of the delusion, are justified from the objective viewpoint of a reasonable person; or
- (b) except as provided in Subsection (4), under the influence of extreme emotional distress that is predominantly caused by the victim's highly provoking act immediately preceding the defendant's actions.

(3) A defendant who is under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under Subsection (2)(a) on the basis of mental illness if the alcohol or substance causes, triggers, or substantially contributes to the defendant's mental illness.

(4) A defendant may not claim special mitigation under Subsection (2)(b) if:

- (a) the time period after the victim's highly provoking act and before the defendant's actions was long enough for an objectively reasonable person to have recovered from the extreme emotional distress;
- (b) the defendant responded to the victim's highly provoking act by inflicting serious or substantial bodily injury on the victim over a prolonged period, or by inflicting torture on the victim, regardless of whether the victim was conscious during the infliction of serious or substantial bodily injury or torture; or
- (c) the victim's highly provoking act, described in Subsection (2)(b), is comprised of words alone.

Modified and moved
to elements of
relevant offense
with xref to this §

(5) (a) If the trier of fact finds that the elements of an offense described in Subsection (5)(b) are proven beyond a reasonable doubt, and also finds that the existence of special mitigation under this section is established by a preponderance of the evidence, the trier of fact shall return a verdict on the reduced charge as provided in Subsection (5)(b).

(b) If under Subsection (5)(a) the offense is:

- (i) aggravated murder, the defendant shall instead be found guilty of murder;
- (ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;
- (iii) murder, the defendant shall instead be found guilty of manslaughter; or
- (iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(c) If the trier of fact finds that special mitigation is not established under this section, the trier of fact shall convict the defendant of the offense for which the prosecution proves all the elements beyond a reasonable doubt.

(6) (a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation under this section.

(b) If the jury finds special mitigation by a unanimous vote, the jury shall return a verdict on the reduced charge as provided in Subsection (5).

(c) If the jury finds by a unanimous vote that special mitigation is not established, or if the jury is unable to unanimously agree special mitigation is established, the jury shall convict the defendant of the greater offense for which the prosecution proves all the elements beyond a reasonable doubt.

(7) (a) If the issue of special mitigation is submitted to the trier of fact, the trier of fact shall return a special verdict indicating whether the existence of special mitigation is found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for the general verdict.

(8) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence proves beyond a reasonable doubt.



Special Mitigation Recod Example

76-5-205.5 Special Mitigation

(5) (a) If the trier of fact finds that the elements of an offense described in Subsection (5)(b) are proven beyond a reasonable doubt, and also finds that the existence of special mitigation under this section is established by a preponderance of the evidence, the trier of fact shall return a verdict on the reduced charge as provided in Subsection (5)(b).

(b) If under Subsection (5)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder...

76-5-202 Aggravated Murder *Recodified*

(3)(f)(i) If the trier of fact finds the elements of aggravated murder, or alternatively, attempted aggravated murder, as described in this section are proved beyond a reasonable doubt, and also finds that the existence of special mitigation is established by a preponderance of the evidence and in accordance with Section 76-5-205.5, the actor:

_____ (A) is guilty of a first degree felony; and
_____ (B) shall be sentenced in accordance with the sentencing provisions of Subsection 76-5-203(3)(b).

_____ (ii) If the trier of fact finds that special mitigation is not established in accordance with Section 76-5-205.5, the trier of fact shall convict the defendant of aggravated murder or attempted aggravated murder, respectively.



Title 76 Recodification

Chapter 5, Part 4



Separated Offenses

- **Sexual abuse of a child | Aggravated sexual abuse of a child**
- **Custodial sexual relations | Custodial sexual misconduct**
- **Custodial sexual relations with youth receiving state services | Custodial misconduct with youth receiving state services**



76-5-407

76-5-407. Applicability of part – "Penetration" or "touching" sufficient to constitute offense.

(1) The provisions of this part do not apply to consensual conduct between individuals married to each other.

(2) In any prosecution for:

(a) the following offenses, any sexual penetration, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving sexual intercourse;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2, involving sexual intercourse; or

(iii) rape, a violation of Section 76-5-402; or

(b) the following offenses, any touching, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving acts of sodomy;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2, involving acts of sodomy;

(iii) forcible sodomy, a violation of Subsection 76-5-403(2);

(iv) rape of a child, a violation of Section 76-5-402.1; or

(v) object rape of a child, a violation of Section 76-5-402.3.

(3) In any prosecution for the following offenses, any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense:

(a) sodomy on a child, a violation of Section 76-5-403.1;

(b) sexual abuse of a child or aggravated sexual abuse of a child, a violation of Section 76-5-404.1;

(c) sexual abuse of a minor, a violation of Section 76-5-401.1;

(d) unlawful sexual conduct with a 16- or 17-year-old, a violation of Section 76-5-401.2;

(e) forcible sexual abuse, a violation of Section 76-5-404;

(f) custodial sexual relations, a violation of Section 76-5-412; or

(g) custodial sexual relations or misconduct with youth receiving state services, a violation of Section 76-5-413.



Limitations: Attempt

Statutes with “attempt” in limitations:

- **76-5-401.1 Sexual Abuse of a Minor**
- **76-5-401.2 Unlawful sexual conduct with 16 or 17 yr old**
- ***76-5-404 Forcible sexual abuse**
- **76-5-404.1 Sexual abuse of a child**
- **76-5-412 Custodial sexual relations**
- **76-5-413 Custodial sexual relations or misconduct with youth receiving state services**

Example current code

76-5-401.1

(2) An individual commits sexual abuse of a minor if the individual is four years or more older than the minor and, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, aggravated sexual assault, in violation of Section 76-5-405, unlawful sexual activity with a minor, in violation of Section 76-5-401, or an attempt to commit any of those offenses



Limitations: No Attempt

Statutes without “attempt” in limitations

- **76-5-401 Unlawful sexual activity with a minor**
- **76-5-401.3 Unlawful adolescent sexual activity**
- ***76-5-404 Forcible sexual assault**

Example current code

76-5-401

(2) A person 18 years old or older commits unlawful sexual activity with a minor if, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, or aggravated sexual assault, in violation of Section 76-5-405, the actor...

76-5-404

(1) An individual commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, forcible sodomy, or attempted rape or forcible sodomy [object rape not included in attempt], the actor touches...



Attempt Added to Limitation

76-5-401. Unlawful sexual activity with a minor -- Elements -- Penalties -- Evidence of age raised by defendant.

(2) A person 18 years old or older commits unlawful sexual activity with a minor if, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, or aggravated sexual assault, in violation of Section 76-5-405, the actor:



76-5-401 Recodified adding “attempt”

(2)(a) Except as provided in Subsection (4), an actor 18 years old or older commits unlawful sexual activity with a minor if...

*(4) If the conduct of an actor 18 years old or older amounts to a violation under one or more of the following, **or an attempt** to violate one or more of the following the actor shall be charged with the violation and not under Subsection (2)(a):

(a) rape, in violation of Section 76-5-402;

(b) object rape, in violation of Section 76-5-402.2;

(c) forcible sodomy, in violation of Section 76-5-403; or

(d) aggravated sexual assault, in violation of Section 76-5-405.

**Current public draft is incorrectly numbered*



Title 76 Recodification

How should “victim” be used in Title 76 if at all?



Example: Stalking 76-5-106.5

537 [(c)] (iii) has been previously convicted of any
felony offense in Utah or of any
538 crime in another jurisdiction which if committed in
Utah would be a
539 felony, in which the victim of the stalking offense or
a member of the
540 victim's immediate family was also a victim of the
previous felony
541 offense;



Example: Hazing 76-5-107.5

711 ~~[(1) A person is guilty of]~~ (2) An actor commits hazing if ~~[that person]~~ the actor
712 intentionally, knowingly, or recklessly commits an act or causes another to commit an act
713 that:
714 (a) (i) endangers the mental or physical health or safety of ~~[another]~~ an individual ;
715 (ii) involves any brutality of a physical nature such as whipping, beating, branding,
716 calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or
717 exposure to the elements;
718 (iii) involves consumption of any food, alcoholic product, drug, or other substance or
719 any other physical activity that endangers the mental or physical health and safety of an
720 individual; or
721 (iv) involves any activity that would subject the individual to extreme mental stress,
722 such as sleep deprivation, extended isolation from social contact, or conduct that subjects
723 another to extreme embarrassment, shame, or humiliation; and
724 (b) (i) is for the purpose of initiation, admission into, affiliation with, holding office in, or
725 as a condition for continued membership in any organization; or
726 (ii) if the actor knew that the ~~[victim]~~ individual is a member of or candidate for
727 membership with a school team or school organization to which the actor belongs or did
728 belong within the preceding two years.

Example: Hazing cont.

732 (a) A violation of Subsection (2) is a class B misdemeanor ~~[except as provided in~~
733 ~~Subsection (3)(b), (c), (d), or (e);]~~ .

734 (b) Notwithstanding Subsection (3)(a), a violation of Subsection (2) is a class A
735 misdemeanor if the act involves:

736 (i) the operation or other use of a motor vehicle;

737 (ii) the consumption of an alcoholic product as defined in Section 32B-1-102; or

738 (iii) the consumption of a drug or a substance as defined in Section 76-5-113~~[:]~~ .

739 (c) Notwithstanding Subsections (3)(a) or (b), a violation of Subsection (2) is a third
740 degree felony if the act involves the use of a dangerous weapon ~~[as defined in Section~~
741 ~~76-1-601;]~~ .

742 (d) Notwithstanding Subsections (3)(a), (b), and (c), a violation of Subsection (2) is a
743 third degree felony if the hazing results in serious bodily injury to ~~[a person; or]~~ an individual.

744 {JR NOTE--not clear in existing language whether the injury must be to the individual hazed
745 or to any individual--Task Force may wish to clarify}



Example: 76-5-406.5. Circumstances required for probation or suspension of sentence for certain sex offenses against a child.

~~[(1)]~~ (2) In a case involving a conviction for a violation of Section 76-5-402.1, rape of a child; Section 76-5-402.3, object rape of a child; Section 76-5-403.1, sodomy on a child; or any attempt to commit a felony under those sections or a conviction for a violation of Subsections 76-5-404.1(4) and (5), aggravated sexual abuse of a child, the court may suspend execution of sentence and consider probation to a residential sexual abuse treatment center only if all of the following circumstances are found by the court to be present and the court in its discretion, considering the circumstances of the offense, including the nature, frequency, and duration of the conduct, and considering the best interests of the public and the ~~[child-victim]~~ harmed individual, finds probation to a residential sexual abuse treatment center to be proper:...

(f) the defendant did not act in concert with another offender during the offense or knowingly commit the offense in the presence of ~~[a person]~~ an individual other than the ~~[victim]~~ harmed individual or with lewd intent to reveal the offense to another;

(g) the defendant did not encourage, aid, allow, or benefit from any act of prostitution or sexual act by the ~~[child-victim]~~ harmed individual with any other ~~[person]~~ individual or sexual performance by the ~~[child-victim]~~ harmed individual before any other ~~[person]~~ individual;



Drafting “victim”

- **Statute is not a court pleading or jury instruction, but there are concerns about using “victim” in statute.**
- **How should offenses with third parties be drafted to clearly identify the “victim” and the third party?**
- **Should the use of “victim” in offense statutes differ from other Title 76 statutes (and cross-referencing statutes) that refer to a “victim”? (Note: we may need to bring other non-offense provisions of Chapter 5 currently not in drafts before the task force to make changes.)**
- **If “victim” is not used, what is the appropriate alternative term that gives clarity and consistency?**
- **What is a clear and consistent rule for drafters going forward?**



Recod Going Foward

- **To do:**
 - Finalize Chapter 5 changes
 - Draft Chapter 5b?
- **October Task Force:**
 - Review and adopt final draft of Chapter 5 (including xref)
 - Review draft of Chapter 5b? (May not have time to incorporate changes before Interim Committee meets in November)
- **November Law Enforcement and Criminal Justice Interim Committee**
 - Task Force Report to Interim Committee
 - Interim Committee may adopt Chapter 5 (and 5b?) draft as committee bill
- **2022 General Session**
 - Pass bill
- **2022**
 - Continue recodifying offense provisions. (Note: once big structural issues are decided, some drafting will go faster.)
 - Determine whether Task Force will continue after 2022 expiration.



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